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8 **UNITED STATES DISTRICT COURT**  
9 **CENTRAL DISTRICT OF CALIFORNIA**  
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11 SUZETTE KELLY, et al.,  
12 Plaintiffs,  
13 v.  
14 FASHION NOVA, INC.,  
15 Defendant.  
16

Case No. CV 23-02360-JAK (RAOx)  
  
REPORT AND  
RECOMMENDATION OF UNITED  
STATES MAGISTRATE JUDGE  
[101]

17 This Report and Recommendation (“Report”) is submitted to the Honorable  
18 John A. Kronstadt, United States District Judge, pursuant to 28 U.S.C. § 636 and  
19 General Order 05-07 of the United States District Court for the Central District of  
20 California.

21 **I. INTRODUCTION**

22 On August 31, 2023, Defendant Fashion Nova, LLC (“Fashion Nova”) filed a  
23 Motion for Sanctions for Spoliation of Evidence and to Strike Deposition Testimony  
24 in Errata Sheet (“Motion”). Dkt. No. 101. Fashion Nova contends that Plaintiffs  
25 Suzette E. Kelly (“Kelly”) and Sarahi Fashion House, Inc. (“Sarahi”) (together  
26 “Plaintiffs”) deleted four YouTube videos identified by Fashion Nova as evidence.  
27 *Id.* at 2. Fashion Nova also moves to strike an errata sheet for Kelly’s deposition. *Id.*  
28

1 The Motion is accompanied by a Local Rule 37-2 Joint Stipulation, Dkt. No.  
2 101-1, a Declaration of Justin M. Sobaje (“Sobaje Declaration”) and exhibits, Dkt.  
3 Nos. 101-2 through 101-30, a Declaration of Carol Von Kaul (“Von Kaul  
4 Declaration”) and exhibits, Dkt. Nos. 101-31 through 101-38, and a Declaration of  
5 Suzette A. Kelly (“Kelly Declaration”), Dkt. No. 101-39. Fashion Nova filed a  
6 Supplemental Memorandum on October 11, 2023. Dkt. No. 131. On October 20,  
7 2023, Plaintiffs filed an untimely Supplemental Declaration of Suzette A. Kelly  
8 (“Kelly Supplemental Declaration”). Dkt. No. 142. A hearing was held on the  
9 Motion on October 25, 2023. Dkt. No. 148.

10 Having considered the parties’ briefing and counsel’s arguments at the October  
11 25, 2023 hearing, for the reasons set forth below, the Court recommends that Fashion  
12 Nova’s Motion be granted in part as to the request for sanctions and denied as to the  
13 request to strike as set forth below.

## 14 II. BACKGROUND

### 15 A. **Procedural Background**

16 Kelly initiated this lawsuit in the Southern District of Florida on September  
17 13, 2021. Dkt. No. 1. Plaintiffs filed a Second Amended Complaint on June 9, 2022.<sup>1</sup>  
18 Dkt. No. 9. The presiding district judge set a case schedule, including deadlines for  
19 filing a joint claim construction and prehearing statement and other claim  
20 construction briefing. Dkt. No. 33.

21 On March 29, 2023, the case was transferred to this district. Dkt. No. 64.  
22 District Judge Kronstadt issued an Order Setting Pretrial Deadlines on May 5, 2023.  
23 Dkt. No. 94. On September 1, 2023, Fashion Nova filed a motion for summary  
24 judgment. Dkt. No. 102.

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27 <sup>1</sup> There is no First Amended Complaint filed on the docket. According to Plaintiffs,  
28 Kelly attempted to file a First Amended Complaint on April 20, 2022, which was  
procedurally defective and excluded from the docket. *See* Dkt. No. 62-1 at 5-6.

On September 7, 2023, Judge Kronstadt granted in part Plaintiffs’ motion for leave to file an amended complaint. Dkt. No. 115. Plaintiffs filed their Third Amended Complaint on September 13, 2023. Dkt. No. 119. Fashion Nova withdrew its September 1, 2023 motion for summary judgment, Dkt. No. 122, and, on September 27, 2023, filed its First Amended Counterclaim and Answer, Dkt. Nos. 123, 124. On September 28, 2023, Fashion Nova filed a motion for summary judgment, which is currently pending. Dkt. Nos. 127-128.

**B. Allegations of Operative Pleadings**

This is a patent and trademark infringement case. *See generally* Third Am. Compl. (“TAC”), Dkt. No. 119. The two design patents at issue are U.S. Patent No. US D674,991 for “V-Cut Jeans” and U.S. Patent No. US D686,00 for “C-Cut Jeans.” *Id.* ¶ 1. The trademark at issue is U.S. Trademark Registration No. 6996681 for “SARAHI,” issued on March 7, 2023. *Id.* ¶ 71.

Kelly is the president Sarahi. *Id.* ¶ 2. In 2013, after securing the patents at issue, Plaintiffs reached out to Fashion Nova to have Fashion Nova market and sell patented jeans from Sarahi’s “Jeans Curves” and “Signature Collections.” *Id.* ¶ 17. Fashion Nova did not respond, but launched its own “Fashion Nova Curves Collection” in 2016, which included jeans. *Id.* ¶ 18. Towards the end of 2017, Sarahi forwarded a written proposal to Fashion Nova to market the patented jeans. *Id.* ¶ 19. Fashion Nova failed to respond. *Id.* Plaintiffs allege that Fashion Nova willfully copied and duplicated the designs embodied in the asserted patents, and offered the same V-Cut and C-Cut jeans for sale on its website. *Id.* ¶ 20. Plaintiffs further allege that Fashion Nova has misappropriated Plaintiffs’ “SARAHI” trademarks and uses confusingly similar marks on its website. *Id.* ¶¶ 56-59.

Fashion Nova filed counterclaims for declaratory judgments of patent invalidity, unenforceability, and non-infringement. *See generally* First Am. Counterclaim, Dkt. No. 123.

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**C. Identification of YouTube Videos at Issue**

On January 10, 2023, the parties filed their Joint Claim Construction and Prehearing Statement. Dkt. No. 45. In that statement, Plaintiffs identified a YouTube video with the link [https://youtu.be/C\\_olwYrT3QI](https://youtu.be/C_olwYrT3QI) as evidence to support their proposed construction of the claims in the patents. *See id.*, Ex. A at 6, 9. Counsel for Fashion Nova followed the link for that video and found a YouTube channel associated with Sarahi Jeans: <https://www.youtube.com/@SarahiJeans>. Joint Stip. at 8; Sobaje Decl., Ex. 17. On January 12, 2023, counsel for Fashion Nova viewed five additional YouTube videos on the Sarahi Jeans YouTube channel. Sobaje Decl. ¶ 30. The titles and then-associated links for the five videos are as follows:

- SarahiJeans Promo!: <https://www.youtube.com/watch?v=yEqnyoo-XX8> (“Video 1”)
- Sarahi Jeans Ad\_1.mp4: <https://www.youtube.com/watch?v=kg4vcufmAx4> (“Video 2”)
- Sarahi Jeans Signature.mp4: <https://www.youtube.com/watch?v=QoqqcrUecU0> (“Video 3”)
- Sarahi Jeans 1: <https://www.youtube.com/watch?v=NxZpAtfkITw> (“Video 4”)
- Sarahi Jeans: [https://www.youtube.com/watch?v=xY\\_q2V\\_5gcI](https://www.youtube.com/watch?v=xY_q2V_5gcI) (“Video 5”)

*Id.* Counsel remembers that the videos showed women wearing jeans identified as Sarahi’s jeans apparently offered for sale. *Id.* ¶ 31. Counsel for Fashion Nova also remembers that as of January 2023, Videos 2, 3, 4, and 5 were identified on the YouTube website as being more than 11 years old, and at least one or more of these four videos showed women wearing Sarahi jeans in one or more locations that appeared to be public locations. *Id.* ¶¶ 32, 33.

On January 12, 2023, counsel for Fashion Nova sent an email to counsel for Plaintiffs identifying Videos 1 through 5 with their titles and links and stating that Fashion Nova intends to use the videos as extrinsic evidence. Sobaje Decl., Ex. 4.

1 On January 17, 2023, Fashion Nova filed its Rebuttal Claim Construction  
2 Expert Disclosure, which supplemented its list of extrinsic evidence with the five  
3 YouTube videos identified in the January 12, 2023 email. Dkt. No. 47 at 1-2.

4 On January 31, 2023, Fashion Nova filed its Opening Claim Construction  
5 Brief. Dkt. No. 50. Fashion Nova attached screenshots of Video 1 and an audio  
6 transcript of Video 2. Dkt. Nos. 50-5, 50-6.

7 **D. Events After Identification of YouTube Videos**

8 On March 10, 2023, counsel for Fashion Nova emailed Plaintiffs' counsel,  
9 stating that Fashion Nova noticed that the five YouTube videos identified in the  
10 January 12, 2023 email and the January 17, 2023 evidence disclosure had been  
11 "removed by the uploader." Sobaje Decl., Exs. 8-13. Fashion Nova requested copies  
12 of the five deleted YouTube videos. Sobaje Decl., Ex. 8. Internet Archive pages  
13 show that Video 4 was available as of February 4, 2023, and Video 5 was available  
14 as of February 5, 2023. Sobaje Decl., Exs. 23 and 24. The Internet Archive pages  
15 show that both videos had been uploaded "11 years ago." *Id.* Counsel for Fashion  
16 Nova followed up on March 17, 2023. Sobaje Decl., Ex. 14.

17 On March 27, 2023, Plaintiffs' counsel responded that it was still being  
18 ascertained whether all the videos were owned and/or uploaded by Plaintiffs. Sobaje  
19 Decl., Ex. 15. Plaintiffs' counsel further stated that Video 1 had been restored and  
20 Plaintiffs were making every effort to restore Videos 2 and 3, which counsel  
21 understood to be of the same content. *Id.* Plaintiffs' counsel requested other  
22 identifying pictorial information for Videos 4 and 5. *Id.* On March 27, 2023, Video  
23 1 was restored to the Sarahi Jeans YouTube channel. Sobaje Decl., Ex. 16.

24 Later on March 27, 2023, counsel for Fashion Nova indicated that it had no  
25 further information about the other videos, but noted that the Sarahi Facebook page  
26 had a July 8, 2011 post with a link to Video 4. Sobaje Decl., Exs. 18-20. Counsel  
27 for Fashion Nova sent Plaintiffs' counsel a letter on May 15, 2023. Sobaje Decl., Ex.  
28 21. Among other things, the letter requested information as to who was responsible

1 for deleting the YouTube videos. *Id.*

2 On May 23, 2023, counsel for Plaintiffs indicated in a letter that Kelly restored  
3 Video 1. Sobaje Decl., Ex. 22. Counsel further wrote that Plaintiffs have  
4 “insufficient access, control, knowledge, or information as to the remaining videos  
5 that were allegedly removed, and/or who removed the same.” *Id.*

6 As of August 23, 2023, Video 1 and the one video identified by Plaintiffs in  
7 the joint claim construction statement are available on the Sarahi Jeans YouTube  
8 channel, but not Videos 2 through 5. Sobaje Decl., Exs. 17, 25.

9 **E. Deposition of Kelly**

10 Kelly’s deposition was taken on March 22, 2023. Sobaje Decl., Ex. 27; Von  
11 Kaul Decl., Ex. A. On May 3, 2023, Kelly served an Errata Sheet for the deposition.  
12 Sobaje Decl., Ex. 28. On May 15, 2023, Fashion Nova objected to the changes made  
13 in the Errata Sheet. Sobaje Decl., Ex. 21.

14 **III. MOTION FOR SANCTIONS FOR SPOILIATION**

15 **A. Legal Standard**

16 Spoliation is the destruction or significant alteration of evidence, or the failure  
17 to preserve evidence, in pending or reasonably foreseeable litigation. *Compass Bank*  
18 *v. Morris Cerullo World Evangelism*, 104 F. Supp. 3d 1040, 1051-52 (S.D. Cal. 2015)  
19 (citing *United States v. Kitsap Physicians Serv.*, 314 F.3d 995, 1001 (9th Cir. 2002)).  
20 Federal Rule of Civil Procedure 37(e) (“Rule 37(e)”) governs the loss of  
21 electronically stored information (“ESI”). Rule 37(e) applies “[i]f electronically  
22 stored information that should have been preserved in the anticipation or conduct of  
23 litigation is lost because a party failed to take reasonable steps to preserve it, and it  
24 cannot be restored or replaced through additional discovery.” Fed. R. Civ. P. 37(e).  
25 The Advisory Committee’s Note to the 2015 Amendment to Rule 37(e) provides that  
26 the amended rule “forecloses reliance on inherent authority or state law to determine  
27 when certain measures should be used” for failure to preserve ESI. Fed. R. Civ. P.  
28 37(e), Advisory Committee’s Note to 2015 Amendment (“Rule 37(e) Advisory

Committee Note”).

Rule 37(e) authorizes two tiers of sanctions for spoliation. Upon a finding of prejudice to another party from loss of the information, a court may employ measures “no greater than necessary to cure the prejudice.” Fed. R. Civ. P. 37(e)(1). If a court finds that the spoliating party “acted with the intent to deprive another party of the information’s use in the litigation,” the court may impose harsh sanctions, including presuming that the lost information was unfavorable to that party, instructing the jury that it may or must presume the information was unfavorable to that party, dismissing the action, or entering a default judgment. Fed. R. Civ. P. 37(e)(2).

The standard of proof for spoliation in the Ninth Circuit is “preponderance of the evidence.” *RG Abrams Ins. v. Law Offices of C.R. Abrams*, 342 F.R.D. 461, 502 (C.D. Cal. Nov. 2, 2022); *see also Fast v. GoDaddy.com LLC*, 340 F.R.D. 326, 339-40 (D. Ariz. 2022) (applying preponderance of the evidence standard to Rule 37(e) analysis).

## **B. Analysis**

### *1. Applicability of Rule 37(e)*

#### *a. Electronically Stored Information*

The parties do not dispute that the YouTube videos constitute ESI.

#### *b. Lost and Cannot be Restored or Replaced*

Fashion Nova does not appear to dispute that Video 1 has been restored. Thus, only Videos 2 through 5 remain at issue. Plaintiffs appear to have exhausted their efforts to restore Videos 2 through 5 and do not suggest that further efforts would be fruitful. Thus, Videos 2 through 5 have been lost and cannot be restored or replaced.

#### *c. Duty to Preserve*

The common-law duty to preserve continues to apply even under Rule 37(e). *See* Rule 37(e) Advisory Committee Note. “A party must preserve evidence it knows or should know is relevant to a claim or defense of any party, or that may lead to the discovery of relevant evidence.” *Compass Bank*, 104 F. Supp. 3d at 1051.

1 Fashion Nova placed Plaintiffs on notice on January 12, 2023 and January 17,  
2 2023 that Fashion Nova intended to rely on Videos 1 through 5 as extrinsic evidence.  
3 Sobaje Decl., Ex. 4; Dkt. No. 47 at 1-2. Although Plaintiffs dispute the relevance of  
4 the videos, Plaintiffs cannot dispute that, as of January 12, 2023, they were placed on  
5 notice that Fashion Nova considered the videos relevant. Once Fashion Nova made  
6 this representation, Plaintiffs had a duty to preserve this evidence to the extent  
7 Plaintiffs had access to, or indirect control over, such evidence. *See Jerry Beeman*  
8 *& Pharmacy Servs., Inc. v. Caremark Inc.*, 322 F. Supp. 3d 1027, 1035 (C.D. Cal.  
9 2018).

10 Kelly explains in her declaration that she obtained access credentials to the  
11 Sarahi Jeans YouTube channel and reviewed the channel in early 2023. *See Kelly*  
12 *Decl.* ¶¶ 6, 9. Kelly concedes that she had access to at least Videos 1, 2, and 3 as she  
13 admits to accidentally deleting Videos 2 and 3 and she was able to restore Video 1.  
14 *See Kelly Decl.* ¶¶ 9, 10.

15 As to Videos 4 and 5, Plaintiffs dispute their existence on the Sarahi Jeans  
16 YouTube Channel. *See Joint Stip.* at 24; *Kelly Decl.* ¶¶ 12-14. Fashion Nova's  
17 evidence shows that these two videos were available as of February 2023. *See Sobaje*  
18 *Decl.*, Exs. 23, 24. Moreover, Fashion Nova presents evidence that the Sarahi  
19 Facebook page posted a link to Video 4 on July 8, 2011. *Sobaje Decl.*, Exs. 18-20.  
20 If these videos never existed on the Sarahi Jeans YouTube channel, Plaintiffs do not  
21 provide a satisfactory explanation why counsel for Fashion Nova included the titles  
22 and hyperlinks for these videos in its January 12, 2023 email, why the Internet  
23 Archive shows—as of early February 2023—that these videos had been uploaded by  
24 the Sarahi Jeans YouTube channel, or why the Sarahi Facebook page posted a link  
25 to Video 4 in July 2011. By a preponderance of the evidence, the Court finds that  
26 Videos 4 and 5 were available on the Sarahi Jeans YouTube channel as of January  
27 12, 2023. Kelly does not argue that she had access to only some of the videos on the  
28 Sarahi Jeans YouTube channel. In light of her ability to access the Sarahi Jeans

1 YouTube channel, the Court finds that Kelly had access to all the videos at issue.

2 Because Kelly had access, Plaintiffs had a duty to preserve the videos after  
3 they were informed that Fashion Nova intended to rely on the videos as evidence.

4 d. Reasonable Steps to Preserve

5 To constitute spoliation under Rule 37(e), ESI must have been lost “because a  
6 party failed to take reasonable steps to preserve it.” Fed. R. Civ. P. 37(e). Courts  
7 “should be sensitive to the party’s sophistication with regard to litigation in  
8 evaluating preservation efforts.” Rule 37(e) Advisory Committee Note.

9 The Court finds that Kelly did not take reasonable steps to preserve the videos.  
10 Although Kelly explains that the Sarahi Jeans YouTube channel was created by a  
11 third party, she was able to gain access and review the channel in early 2023. *See*  
12 Kelly Decl. ¶¶ 6, 9. Once Plaintiffs were informed that Fashion Nova intended to  
13 rely on five videos on the YouTube channel, they should have taken reasonable steps  
14 to preserve the videos. Plaintiffs do not describe any steps they took to preserve any  
15 of the videos after Fashion Nova sent its January 12, 2023 email.

16 Instead of taking steps to preserve the videos, Kelly admits to deleting Videos  
17 2 and 3. Kelly Decl. ¶ 9. Although Kelly does not provide the exact date she deleted  
18 Videos 2 and 3, it appears that she requested her credentials from YouTube in January  
19 2023 or shortly thereafter, Kelly Decl. ¶ 6, and Kelly does not deny deleting them  
20 after January 12, 2023.

21 As to Videos 4 and 5, Kelly denies that she deleted them. Kelly Decl. ¶ 13.  
22 Plaintiffs also suggest that Videos 4 and 5 may have been removed by YouTube as  
23 unauthorized postings of a third party’s trademark. *See* Joint Stip. at 24. Other than  
24 Kelly’s lack of recollection about Videos 4 and 5, Plaintiffs set forth no evidence that  
25 the removal of these videos was any different than the removal of Videos 1, 2, and 3.  
26 Fashion Nova presents evidence that when its counsel tried to view the five videos  
27 in March 2023, YouTube indicated that all five videos had been “removed by the  
28 uploader.” Sobaje Decl., Exs. 9-13. There is no language suggesting that some

1 videos were removed by YouTube for infringing on a trademark. Moreover,  
2 Plaintiffs allege ownership of the Sarahi trademark, and presumably YouTube  
3 recognized this in granting Kelly credentials after requiring her to provide proof of  
4 ownership. *See* Kelly Decl. ¶ 6. There also does not appear to be any reason why  
5 YouTube would remove Videos 4 and 5 as unauthorized, while not removing any of  
6 the other videos which use the same “Sarahi” trademark. The reasonable inference  
7 is that all five videos were deleted from the Sarahi Jeans YouTube channel by Kelly.

8 Kelly’s lack of sophistication regarding the permanent nature of deletion of  
9 YouTube videos does not alter the Court’s analysis because it is undisputed that Kelly  
10 failed to take any steps to preserve the videos after Fashion Nova specifically  
11 identified the videos as relevant evidence. The affirmative deletion of videos,  
12 regardless of whether Kelly believed the deletion to be temporary or permanent, does  
13 not constitute reasonable steps to preserve them.

14 In sum, the Court finds that the YouTube videos should have been preserved  
15 after Fashion Nova sent its January 10, 2023 email, and the videos were lost after  
16 that date because Plaintiffs failed to take reasonable steps to preserve them.

17 2. *Sanctions*

18 Because the threshold elements for finding spoliation under Rule 37(e) have  
19 been met, the Court turns to whether and what sanctions are warranted.

20 a. Intent to Deprive

21 Rule 37(e)(2) requires “a finding that the party acted with the intent to deprive  
22 another party of the information’s use in litigation.” Fed. R. Civ. P. 37(e)(2).  
23 “[C]ourts have found that a party’s conduct satisfies Rule 37(e)(2)’s intent  
24 requirement when the evidence shows or it is reasonable to infer, that a party  
25 purposefully destroyed evidence to avoid its litigation obligations.” *Martinez v.*  
26 *Equinox Holdings, Inc.*, No. 8:20-cv-02413-JLS-KES, 2021 WL 6882152, at \*3  
27 (C.D. Cal. Oct. 22, 2021). “[I]ntent may be inferred where a party is on notice that  
28 documents potentially are relevant but fails to take the steps necessary to preserve

1 them.” *RG Abrams*, 342 F.R.D. at 508. Generally, courts “must look to  
2 circumstantial evidence to determine intent.” *Laub v. Horbaczewski*, No. CV 17-  
3 6210-JAK (KS), 2020 WL 9066078, at \*6 (C.D. Cal. July 22, 2020). “Relevant  
4 factors can include, *inter alia*, the timing of the destruction, the method of deletion  
5 (e.g., automatic deletion vs. affirmative steps of erasure), selective preservation, the  
6 reason some evidence was preserved, and, where relevant, the existence of  
7 institutional policies on preservation.” *Id.*

8 Here, applying the preponderance of the evidence standard, the Court finds  
9 that there is sufficient circumstantial evidence from which to infer intent. When  
10 counsel for Fashion Nova viewed the videos in January 2023, they were identified as  
11 being more than 11 years old at the time. Sobaje Decl. ¶ 32. After being available  
12 for at least 11 years as of January 2023, the videos were deleted within two months  
13 of Fashion Nova informing Plaintiffs of Fashion Nova’s intent to rely on these  
14 specific videos as extrinsic evidence. The timing of the destruction is consistent with  
15 an intent to deprive. *See RG Abrams*, 342 F.R.D. at 509 (finding intent to deprive  
16 where individual traded in cell phone device after being served with discovery  
17 specifically seeking the text messages contained therein).

18 Kelly admits to deleting at least two of the four lost videos. And, as explained  
19 above, the preponderance of the evidence shows that all the lost videos were deleted  
20 by Kelly. Because deletion was affirmative, rather than automatic, this supports a  
21 finding of an intent to deprive. Although Kelly argues that she did not understand  
22 the permanent nature of deletion of YouTube videos, *see Joint Stip.* at 24, she does  
23 not explain why she would have attempted even temporary deletion after Plaintiffs  
24 had been placed on notice that Fashion Nova considered the videos to be relevant.

25 There is also evidence of selective preservation. The one video Plaintiffs relied  
26 on for their claim construction was never deleted, whereas all five videos identified  
27 by Fashion Nova as extrinsic evidence were deleted (with only one subsequently  
28 restored). Additionally, there are two other videos, from “4 years ago,” on the Sarahi

1 Jeans YouTube channel with “SarahiJeans” in their title that were not deleted. *See*  
2 Sobaje Decl., Ex. 17. Other than stating that it was accidental, Kelly provides no  
3 reason as to why she deleted only videos identified by Fashion Nova.

4 Kelly also argues that she did not have a culpable statement of mind because  
5 she promptly attempted to restore the lost videos once she learned of their removal.  
6 *See Joint Stip. at 24.* Video 1 was restored on March 27, 2023, after Fashion Nova  
7 sent its March 10, 2023 email noting the missing videos. Kelly does not describe any  
8 efforts to restore or replace the videos prior to Fashion Nova pointing out their  
9 removal. The fact that Kelly restored one video after Fashion Nova noted the  
10 disappearance of the videos does not negate an intent to deprive at the time of  
11 deletion, even if it may show efforts to mitigate the consequences after the opposing  
12 party discovered the deletion. Thus, the Court gives little weight to the promptness  
13 of Kelly’s efforts after Fashion Nova sent its March 10, 2023 email.

14 Finally, the Court addresses Plaintiffs’ argument that they had no strategic  
15 reason for deleting the videos because they contained duplicative evidence of  
16 marginal relevance. *See Joint Stip. at 25.* The Court must treat Kelly’s assertions of  
17 the contents of the videos with skepticism, given that the videos are now lost due to  
18 Kelly’s failure to take steps to preserve them. Moreover, even if Plaintiffs did not  
19 agree with Fashion Nova’s assertion that the videos would help Fashion Nova’s case,  
20 there is a clear strategic advantage in depriving an opposing party of evidence the  
21 opposing party deems relevant.

22 In sum, the Court concludes that by a preponderance of the evidence, Plaintiffs  
23 acted with the intent to deprive Fashion Nova of the use of the four lost videos.<sup>2</sup>

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24  
25 <sup>2</sup> On October 20, 2023, after the deadline to submit supplemental memoranda under  
26 Local Rule 37-2.3 passed, Plaintiffs submitted a supplemental declaration by Kelly.  
27 Dkt. No. 142. The Court declines to consider the supplemental declaration because  
28 it is untimely. Moreover, the supplemental declaration would not affect the Court’s  
analysis. The YouTube channel history report attached as Exhibit A does not appear  
to reflect if or when videos were deleted by the user. The fact that Kelly twice

1                   b.     Prejudice

2             A finding of intent can support an inference that the opposing party was  
3 prejudiced by the loss of information that would have favored its position, and thus  
4 subdivision (e)(2) does not require any further finding of prejudice. Rule 37(e)  
5 Advisory Committee Note. However, prejudice may still be relevant in determining  
6 sanctions because finding an intent to deprive does not require a court to adopt any  
7 of the measures listed in subdivision (e)(2). *Id.* “Rule 37(e) intentionally leaves to  
8 the court’s discretion exactly what measures are necessary.” *Matthew Enter., Inc. v.*  
9 *Chrysler Grp. LLC*, No. 13-cv-04236-BLF, 2016 WL 2957133, at \*3 (N.D. Cal. May  
10 23, 2016). “Courts should exercise caution . . . in using the measures specified in  
11 (e)(2). . . . The remedy should fit the wrong, and the severe measures authorized by  
12 this subdivision should not be used when the information lost was relatively  
13 unimportant or lesser measures such as those specified in subdivision (e)(1) would  
14 be sufficient to redress the loss.” Rule 37(e) Advisory Committee Note.

15             Fashion Nova argues that the lost videos would have supported its argument  
16 that the on-sale bar precludes Plaintiffs’ patent claims. Joint Stip. at 17-19. The  
17 design patents at issue were filed on June 19, 2012, making June 19, 2011 the critical

18 \_\_\_\_\_  
19 watched videos that were subsequently removed is not relevant to the analysis. *See*  
20 Kelly Suppl. Decl. ¶ 5. Even if it were relevant, the report does not provide any  
21 information about whether those videos were any of the lost videos at issue. *See*  
22 Kelly Suppl. Decl., Ex. A. That Kelly previously viewed a video at the link  
23 [https://www.youtube.com/watch?v=9\\_kEoP42JOQ](https://www.youtube.com/watch?v=9_kEoP42JOQ), which is “no longer available  
24 due to a trademark claim by a third party,” *see* Kelly Suppl. Decl. ¶¶ 6, 8 & Ex. B, is  
25 also not relevant because that link does not correspond to any of the videos at issue  
in this Motion and there is no evidence that this video was uploaded to the Sarahi  
Jeans YouTube channel or that the video is related to Plaintiffs, their products, or  
their intellectual property.

26             Additionally, the Court declines to consider slides with new evidence  
27 presented by Fashion Nova at the October 25, 2023 hearing. The new evidence  
28 regarding deletion of videos on YouTube was not previously submitted to the Court  
and thus is untimely. Also, Fashion Nova’s new evidence would not change the  
Court’s analysis as there is sufficient timely evidence to show an intent to deprive.

1 date for purposes of the prior sale bar. *See* TAC, Exs. A, B. The Court has reviewed  
2 the Sarahi Jeans YouTube channel at issue.<sup>3</sup> When the Court views the “About”  
3 information of the channel, it indicates that the channel “joined” YouTube on July 2,  
4 2011. Thus, any video available on the channel must have been published on or after  
5 July 2, 2011. It does not appear that the fact of publishing any video on this channel  
6 could have itself constituted an on-sale bar.

7 Fashion Nova contends that even if the videos themselves were not published  
8 prior to the critical date, the videos could have provided visual evidence of jeans that  
9 were referenced in other forms of advertisement prior to June 19, 2011. Joint Stip.  
10 at 17. Fashion Nova also points to Plaintiffs’ rebuttal expert report, which criticized  
11 Fashion Nova’s failure to provide accompanying display for advertisements for sale.  
12 Joint Stip. at 11-12; Sobaje Decl., Ex. 26. Fashion Nova could have inspected the  
13 videos to see if they provided display for other advertisements of sale, or if they  
14 depicted the same models in the same jeans and in the same settings as photographs  
15 that were published prior to June 19, 2011. Joint Stip. at 17. Fashion Nova also  
16 could have used the contents of the video to determine whether they were shot in  
17 public prior to the critical date. *See* Suppl. Mem. at 4. Additionally, the videos may  
18 have been relevant in determining whether jeans on sale around the time of the videos  
19 reflected the patented designs, rather than or in addition to the copyrighted designs.  
20 *Id.* at 5. The Court agrees that Fashion Nova is prejudiced in not being able to rely  
21 on these videos in the described manner to support its case.

22 The Court is not persuaded by Plaintiffs’ arguments that there is no prejudice  
23 because Video 1 was restored and Fashion Nova created an audio transcript for Video  
24 2. *See* Joint Stip. at 5. There is no evidence that Videos 2 through 5 were similar to  
25 Video 1. Thus, the restoration of Video 1 does not mitigate any of the prejudice from  
26 the loss of Videos 2 through 5. As to Videos 2 and 3, the audio transcript is not a

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27 <sup>3</sup> Counsel for both sides agreed at the October 25, 2023 hearing that the Court may  
28 visit the Sarahi Jeans YouTube channel in considering the Motion.

1 sufficient substitute where the patents at issue are design patents and the videos may  
2 have shown the patented designs in use and from different angles. Moreover, to  
3 support its on-sale bar defense, Fashion Nova would need to match the appearance  
4 of the models and locations to photographs that pre-date June 19, 2011.

5 On the other hand, the lost videos are far from the only evidence Fashion Nova  
6 has to show an on-sale bar. As Plaintiffs' counsel pointed out, Fashion Nova has  
7 pointed to substantial evidence in other forms to support its motion for summary  
8 judgment. And, as explained above, the fact of publication of the videos on the  
9 YouTube channel could not on its own have constituted a sale prior to June 19, 2011.  
10 As to functionality, there does not appear to be any reason why Fashion Nova could  
11 not rely on more recent statements or depictions of the jeans. Therefore, the Court  
12 finds that while Fashion Nova is prejudiced by the loss of the videos, it is not to the  
13 extent argued by Fashion Nova.

14 c. Appropriate Sanctions

15 Fashion Nova requests dismissal of the action and an award of its attorneys'  
16 fees. Joint Stip. at 7. Alternatively, Fashion Nova requests the Court enter an order  
17 presuming lost information was unfavorable to Plaintiffs and that the Court instruct  
18 the jury that it must presume the information in the deleted videos was unfavorable  
19 to Plaintiffs. *Id.*

20 The Court finds that the most severe sanction of dismissal is not warranted.  
21 As explained above, while there is some prejudice to Fashion Nova from the loss of  
22 the videos, the videos on their own could not have invalidated the patents at issue  
23 based on the on-sale bar and Fashion Nova has other evidence of prior sales. Thus,  
24 disposal of the entire case based on spoliation of these videos does not "fit the  
25 wrong." *See Colonies Partners, L.P. v. Cnty. of San Bernardino*, 5:18-cv-00420-  
26 JGB (SHK), 2020 WL 1496444, at \*11 (C.D. Cal. Feb. 27, 2020) ("Terminating  
27 sanctions may be warranted where a party is no longer able to present its case,  
28 spoliation occurs in direct violation of a court order, where a party has obviously

1 engaged in deceptive practices during litigation, or where a court anticipates  
2 continued deceptive misconduct.”), *report and recommendation adopted*, 2020 WL  
3 1491339 (C.D. Cal. Mar. 27, 2020).

4 The Court finds that an adverse inference is appropriate given the  
5 preponderance of evidence that shows Plaintiffs’ intent to deprive Fashion Nova of  
6 the use of the four lost videos. However, a mandatory inference instruction would  
7 be too harsh given the nature of the lost videos and other evidence available to  
8 Fashion Nova. The Court finds that a permissive inference instruction more  
9 appropriately matches the prejudice suffered by Fashion Nova. *See Estate of Bosco*  
10 *v. Cnty. of Sonoma*, 640 F. Supp. 3d 915, 930-31 (N.D. Cal. 2022) (finding a  
11 permissive adverse inference, rather than a mandatory instruction, was warranted  
12 because even though the missing video was undoubtedly important evidence, there  
13 was other evidence regarding the underlying incident). At trial, Fashion Nova may  
14 present evidence regarding the loss of the videos and the Court will recommend that  
15 an instruction be provided to the jury that it may presume the lost videos were  
16 unfavorable to Plaintiffs, including that the videos would have shown the patented  
17 designs.

18 At the hearing, Plaintiffs requested the Court take into consideration Kelly’s  
19 lack of sophistication when determining the severity of the sanctions. The Court  
20 finds that Kelly’s deletion of videos after Fashion Nova sent an email to Plaintiffs’  
21 counsel indicating its intent to rely on the videos warrants the severe sanction of a  
22 permissive adverse inference. This is not a case of an individual making a  
23 determination of legal relevance or losing ESI due to automatic deletion, where the  
24 lack of legal or technical sophistication, respectively, might play a significant role in  
25 the consideration of spoliation sanctions. *See, e.g., Laub*, 2020 WL 9066078, at \*5-  
26 7 (denying Rule 37(e)(2) sanctions where ESI was destroyed due to failure to change  
27 default settings for automatic deletion of old text messages and replacement of phone  
28 and there was no evidence that individual plaintiff was expressly informed to

1 preserve all relevant evidence); *Martinez*, 2021 WL 6882152, at \*4 (denying request  
2 for terminating sanctions and adverse jury instruction where individual plaintiffs’  
3 text messages were lost due to glitches, factory resets, and auto-delete settings of  
4 phones). Here, the videos were specifically identified by Fashion Nova as relevant  
5 evidence, eliminating the need for Kelly to apply any legal knowledge in determining  
6 whether the videos should be preserved. Also, Plaintiffs are represented by counsel,  
7 who should be aware of the duty to preserve after an opposing party identifies  
8 evidence as relevant. Additionally, the videos were affirmatively deleted. Kelly  
9 cannot blame the deletion on lack of technical knowledge about an automatic or  
10 default deletion setting. Thus, the Court is not persuaded that any lack of  
11 sophistication on Kelly’s part should mitigate the harshness of the recommended  
12 sanction.

13 Finally, the Court finds that Fashion Nova should be compensated for the fees  
14 it incurred to bring the spoliation portion of this Motion because Fashion Nova would  
15 not have had to bring this motion if the videos at issue were not lost. At the October  
16 25, 2023 hearing, Plaintiffs raised a “David v. Goliath” argument regarding any fee  
17 award. The Court will recommend that the amount of the fees award be litigated by  
18 the undersigned magistrate judge through further briefing. Plaintiffs will have an  
19 opportunity to address the reasonableness of Fashion Nova’s fee request, including  
20 ability to pay.

21 **IV. MOTION TO STRIKE DEPOSITION TESTIMONY IN ERRATA**  
22 **SHEET**

23 Under Federal Rule of Civil Procedure 30(e)(1), within 30 days of being  
24 notified that a transcript or recording is available, a deponent is allowed to review the  
25 transcript or recording and, “if there are changes in form or substance, to sign a  
26 statement listing the changes and the reasons for making them.” Fed. R. Civ. P.  
27 30(e)(1).

28 ///

1 In *Hambleton Bros. Lumber Co. v. Balkin Enters., Inc.*, 397 F.3d 1217 (9th  
2 Cir. 2005), the Ninth Circuit affirmed the district court’s order granting a motion to  
3 strike deposition corrections. *Id.* at 1224-26. There, the deponent had missed the 30-  
4 day deadline, there were no explanations for the corrections, the corrections were  
5 extensive, and the corrections were submitted after a motion for summary judgment  
6 had been filed. *Id.* at 1224-25. In that context, the Ninth Circuit found that  
7 corrections offered solely to create a material factual dispute are akin to a “sham”  
8 affidavit. *Id.* at 1225. The Ninth Circuit stated that “Rule 30(e) is to be used for  
9 corrective, and not contradictory, changes.” *Id.* at 1226. The Ninth Circuit held that  
10 the district court did not abuse its discretion in striking the deposition errata because  
11 the plaintiffs failed to comply with the procedural dictates of Rule 30(e). *Id.*

12 As explained in *Alvarez v. XPO Logistics Cartage, LLC*, No. CV 18-3736-  
13 RGK(Ex), 2020 WL 11563057 (C.D. Cal. Aug. 17, 2020), there are at least three  
14 schools of thought subsequent to *Hambleton*. *Id.* at \*2. One interpretation is that  
15 only transcription errors may be corrected, with all other purported corrections being  
16 impermissibly contradictory of what was said under oath at deposition. *Id.* Another  
17 interpretation is that corrections are improper only if they are a “sham” with respect  
18 to a pending motion for summary judgment. *Id.* And a third interpretation is that  
19 corrections are improper if they are sham (without requiring a pending motion for  
20 summary judgment) or they are contradictory rather than corrective. *Id.* A number  
21 of courts have adopted each of these schools of thoughts. *See id.* (collecting cases).

22 Here, Fashion Nova does not challenge the corrections as violating any of the  
23 procedural requirements of Rule 30(e). Rather, Fashion Nova focuses on the nature  
24 of the corrections. The Court declines to find that the corrections are “sham” changes  
25 because Plaintiffs made the changes to the testimony prior to Fashion Nova filing a  
26 motion for summary judgment, and it does not appear that Plaintiffs directly cite to  
27 any of the specific changes in opposing the pending motion for summary judgment.  
28 While the changes do not appear to be corrections of transcription errors, the Court

1 finds that permitting only transcription errors would not be consistent with a plain  
2 reading of Rule 30(e)(1), which permits “changes in form or substance.” Although  
3 the Court has concerns about the nature of some of the changes, not all of changes  
4 appear to be clearly contradictory. And even if the Court were to strike the errata,  
5 this would not preclude Kelly from testifying at trial that she attempted to change her  
6 testimony and explaining her reasons for the attempted changes. Thus, there is  
7 limited prejudice to Fashion Nova in declining to strike the errata sheet, so long as  
8 Fashion Nova is permitted to challenge Kelly’s testimony at trial with her original  
9 deposition testimony.

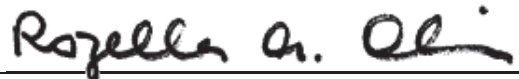
10 Given these circumstances, the Court finds that the most appropriate remedy  
11 would be to decline to strike the errata sheet but permit Fashion Nova to use the  
12 original deposition testimony at trial for cross-examination and impeachment  
13 purposes. *See Gunaratna v. Dennis Gross Cosmetology LLC*, No. CV 20-2311-  
14 MWF (GJSx), 2023 WL 5505052, at \*9 (C.D. Cal. Apr. 4, 2023) (denying motion to  
15 strike where the clarifications were not nearly as significant as defendant claimed and  
16 defendant remained free to challenge plaintiffs’ credibility through cross-  
17 examination); *Doe v. Los Angeles Unified Sch. Dist.*, 2:16-cv-00305-CAS (JEMx),  
18 2017 WL 1531150, at \*14-15 (C.D. Cal. Apr. 24, 2017) (denying motion to strike  
19 deposition testimony corrections where they were timely and submitted in advance  
20 of summary judgment proceedings and the corrections did not assist in evading  
21 summary judgment); *Shinde v. Nithyananda Foundation*, ED CV 13-363-JGB (SPx),  
22 2015 WL 12746703, at \*6 (C.D. Cal. May 21, 2015) (finding remedy of permitting  
23 defendants to use change in testimony to impeach plaintiff during trial to be more  
24 appropriate than motion to strike).

## 25 **V. RECOMMENDATION**

26 For the reasons discussed above, **IT IS RECOMMENDED** that the District  
27 Court issue an Order approving and accepting this Report and Recommendation, and  
28 ordering that Fashion Nova’s Motion be granted in part and denied in part as follows:

- (1) Granting Fashion Nova's request for sanctions under Rule 37(e)(2) in the form of monetary sanctions for reasonable expenses, including attorneys' fees, incurred in bringing the spoliation portion of the Motion, in an amount to be determined at a later date by the Magistrate Judge after further submissions by the parties;
- (2) Granting Fashion Nova's request for sanctions under Rule 37(e)(2) in the form of an instruction to the jury that it may presume the lost YouTube videos were unfavorable to Plaintiffs, including that the videos would have shown the patented designs;
- (3) Denying Fashion Nova's request for terminating sanctions or a mandatory adverse inference instruction; and
- (4) Denying Fashion Nova's request to strike the errata sheet for Kelly's deposition testimony, but permitting Fashion Nova to use the original deposition testimony for cross-examination and impeachment purposes.

DATED: October 30, 2023



ROZELLA A. OLIVER  
UNITED STATES MAGISTRATE JUDGE

**NOTICE**

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in Local Civil Rule 72 and review by the District Judge whose initials appear in the docket number. No Notice of Appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the Judgment of the District Court.